86-1442

No.

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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JOHN DOE,
*Cross-Petitioner*

v.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE

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## CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Whether an employee of the Central Intelligence Agency who has been discharged on the ground that his homosexuality creates a security risk is entitled to a statement of reasons for the Agency's determination, where there has been no claim or showing that disclosure of the reasons would compromise security.

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In the event the Court grants the petition in *Gates* v. *Doe*, No. 86-1294, cross-petitioner John Doe petitions for a writ of certiorari to review portions of the judgment of the United States Court of Appeals for the District of Columbia Circuit that are adverse to him.

## OPINIONS BELOW

The opinion of the court of appeals (App.[1] 1a-55a) is reported at 796 F.2d 1508. The opinion of the district court (App. 59a-78a) is reported at 601 F. Supp. 581.

## JURISDICTION

The judgment of the court of appeals (App. 79a-80a) was entered on August 1, 1986. A timely petition for rehearing was denied on October 9, 1986. (App. 81a.)

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[1] "App." refers to the appendix to the petition for certiorari in No. 86-1294.

The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 6, 1987, and the petition in No. 86-1294 was filed and served on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

In No. 86-1294, the government contends that the court of appeals erred in holding that the decision of the Director of Central Intelligence to discharge cross-petitioner Doe is judicially reviewable. In this cross-petition, Doe submits that the court of appeals rendered the right to review meaningless by holding that Doe was not entitled to know the reasons for the Director's decision.

### A. Background

The petition in No. 86-1294 contains a statement of the factual background that, while generally adequate, requires elaboration in two respects. First, it is undisputed that (1) Doe is not embarrassed or ashamed about his homosexuality; (2) his family, friends, and some of his neighbors are aware of his sexual orientation; (3) his homosexuality has never disrupted or adversely affected the performance of his duties with the CIA; and (4) he has not disclosed any classified information to any sexual partner or to any other unauthorized person, a fact that was confirmed by the CIA's polygraph examination of Doe. (App. 4a, 61a-62a.)

Second, the government's statement omits material aspects of the proceedings that preceded Doe's discharge. Following extensive interviews with Doe concerning his homosexuality and possible security violations, a CIA polygraph officer prepared a five-page factual report. Doe was permitted to review this report and submit a two-page addendum. (App. 4a) Security officers then told Doe that they would prepare an "adjudication" of his case on the basis of the factual report and would forward both documents to the Director of Security.

(App. 4a, 62a.) Three weeks later, a security officer informed Doe that the Office of Security had determined that "the circumstances of his homosexuality posed a security threat." (App. 4a). When Doe asked for the reasons for this determination, the security officer refused to explain. (App. 4a, 62a.)

Doe was asked to resign, but refused. (App. 4a.) The Office of Security then recommended to the Director of Central Intelligence that Doe's employment be terminated. (*Id.*) Through counsel, Doe was permitted to submit a statement to the Director. However, the Agency refused to allow access to the "adjudication," and therefore Doe was unable to respond to that document. (App. 4a-5a, 62a.)

Subsequently, the Agency's Deputy General Counsel informed Doe's counsel by letter that the Director had "deemed it necessary and advisable in the interests of the United States to terminate your client's employment with this Agency." (App. 5a.) That letter also stated that "[t]he Director has reviewed the facts of your client's case, your client's memorandum commenting upon those facts, the Office of Security's evaluation of the security significance of those facts, and the statement submitted by you in your client's behalf." (*Id.*) Since Doe was the sole source of the facts reviewed by the Agency, determination of his case did not involve information provided by confidential sources. Moreover, the CIA never asserted that the "adjudication" could not be disclosed for reasons of security.

**B. The Nature of Doe's Claims**

In his complaint, Doe sought an order requiring the CIA to reconsider his security suitability under minimally fair procedures that would provide him with (1) an explanation of why the Agency had determined that the circumstances of his homosexuality pose a security threat and (2) an opportunity to respond. (App. 60a.) Doe identified three bases for this claim to fair proce-

dures: CIA regulations, the Administrative Procedure Act, and the Fifth Amendment.

CIA Headquarters Regulation 20-27m provides that "[n]ormally, separations by the Agency will be effected in accordance with the procedures" contained in the regulation. (App. 19a-20a.) These procedures require the Agency to notify the employee of the reasons why separation is being recommended and to give the employee an opportunity to comment orally or in writing. (App. 71a.) Where circumstances "make these procedures impractical or undesirable, . . . the case should be handled in a manner conforming to the circumstances." (App. 20a.) The regulations also provide that "any employee may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States." (*Id.*)

Doe contended that under both the Administrative Procedure Act and the Fifth Amendment he had the right to be notified of the reasons why his homosexuality had been deemed to present a security risk and to respond to these reasons. Doe's Fifth Amendment claim rested on his contention that the Director's decision had deprived him of (1) a liberty interest by stigmatizing him as a security threat, and (2) a property interest in continued employment. With respect to this property interest, Doe argued that section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), CIA regulations, and Agency policy statements gave him a reasonable expectation of continued employment as long as his services were needed, he performed his job well, and he protected classified information from unauthorized disclosure.

### C. The Rulings Below

The district court ruled that CIA regulations required the Agency to give Doe (1) an explanation for its conclusion that the circumstances of his homosexuality pre-

sented a security risk and (2) an opportunity to respond. (App. 71a-74a.) The district court did not address either prong of Doe's Fifth Amendment claim or his APA claim.

On appeal, the CIA did not contest the proposition that a federal court can require the Agency to follow its own regulations; instead, it argued that the district court misconstrued what the CIA's regulations require. Nor did the CIA argue that judicial review of Doe's constitutional claim was precluded; in this regard, the Agency contended only that no property or liberty interests were burdened by the Director's action. The Agency's argument concerning the preclusion of judicial review was directed only at Doe's efforts to obtain review under the Administrative Procedure Act.

The court of appeals agreed with the government that the district court had misconstrued the CIA's regulations and held that those regulations provide no independent source of procedural or substantive protections. (App. 19a-23a.) The court, however, rejected the Agency's contention that APA review was precluded by section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c). (App. 7a-19a.) It then proceeded to review Doe's termination under the APA to determine whether the Director's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). (App. 23a-24a.)

Purporting to apply that standard, the court of appeals concluded that Doe was not entitled to a statement of reasons. Adverting to "the sensitive nature of the CIA's mission," the court stated that it "must operate under a presumption that the CIA is acting lawfully and in good faith in any invocation of section 102(c), unless the plaintiff gives adequate reason to believe otherwise." (App. 26a.) "Only if a plaintiff offers a basis for suspicion that the Director terminated the plaintiff's em-

ployment for an impermissible reason will we require the Director to justify his or her decision." (*Id.*)[2]

The court of appeals never addressed Doe's claim that he had a property interest in continued employment, of which he cannot be deprived without due process. But the court did agree that the Director's determination deprived Doe of a liberty interest in his reputation. (App. 28a-30a.) Nonetheless, the court held that the requirements of due process had been satisfied because "Doe was given a meaningful opportunity to contest any allegation that his homosexuality presented a security risk," and "[i]n the context of a very sensitive agency such as the CIA, we cannot say that the Constitution requires more." (App. 31a-32a.) In reaching this conclusion, the court did not mention that Doe was never told why the Agency reached its determination that his homosexuality posed a security risk.

## REASONS FOR GRANTING THE PETITION

This case presents an important question concerning whether firmly established procedural protections should be diluted or withdrawn altogether in the face of perceived dangers to the national security, where the government has not made even a preliminary claim or showing that such dangers actually exist. For many years, it has been an accepted principle of both administrative law and due process jurisprudence that a person adversely affected by an agency's determination has a right to know the reasons for that determination and to have an opportunity to respond. The court of appeals turned this principle on its head and placed on cross-

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[2] The court of appeals remanded the case for further consideration of whether the CIA has a policy barring employment on the basis of homosexual orientation rather than homosexual conduct. (App. 27a.) The court stated that if the Agency's prohibition was based on homosexual orientation rather than conduct, Doe has an arguable constitutional claim to litigate. (*Id.*)

petitioner Doe the burden of showing that the Agency's determination was improper before the agency would be required to explain its reasons.

To be sure, there may be some cases where an agency such as the CIA cannot disclose its reasons for terminating an employee. However, there are established, workable procedures for separating those cases from cases where, as here, there has been no assertion that national security would be endangered by providing the aggrieved person with the reasons for the Agency's action.

The decision of the court of appeals warrants review for two reasons. First, it jeopardizes the rights of thousands of federal employees, not only at the CIA, but also at other government agencies that could assert, under the decision below, that considerations of national security require departure from well-recognized procedural protections. Second, this case offers an opportunity for the Court to affirm that the rule of law applies to the government's national security agencies and that traditional notions of procedural regularity need not be abandoned at the mere invocation of the phrase "national security."

The critical defect in the CIA's handling of Doe's case was its refusal to provide him with the evaluation prepared by the Office of Security that set forth the reasons why the circumstances of his homosexuality presented a security threat. Although Doe was given an opportunity to appeal to the Director from the Office of Security's recommendation that Doe be terminated, that opportunity was meaningless without access to the evaluation. Without this document, Doe was unable to know whether the adverse determination about his homosexuality was based on some misunderstanding of the facts of his case or on an irrational bias toward homosexuals. Without this document, Doe's appeal to the Director was a blind shot in the dark.

The CIA never asserted that the Office of Security's adjudication was withheld for reasons of confidentiality or secrecy; the refusal rests solely on the exercise of an unexplained prerogative. Furthermore, the letter from the CIA's Deputy General Counsel makes clear that Doe himself was the sole source of all the facts on which the evaluation was based. (App. 5a.) Thus, there is no discernible reason why considerations of confidentiality or sensitivity—even if asserted—should prevent Doe from having access to the evaluation.

1. The due process clause of the Fifth Amendment, the Administrative Procedure Act, and the CIA's regulations entitle Doe to an explanation of the Agency's determination that the circumstances of his homosexuality present a security threat.

a. This Court recently held that when a government agency proposes to fire a public employee who has a property interest in continued employment, the Fifth Amendment entitles him "to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546 (1985). Here, the court of appeals held that Doe may have had a liberty interest in clearing his name. (App. 28a-30a.) This should have led the court to conclude that Doe is entitled to the same procedural protections afforded in *Loudermill*. The court nevertheless exempted the CIA from providing any explanation of its position.

b. Apart from the Fifth Amendment, the Court has frequently emphasized that, as a matter of administrative procedure, a person subject to an informal agency adjudication is entitled to know the reasons for the agency's proposed action. *E.g.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 571-72 (1975). *See* 5 U.S.C. § 555(e). In this context, the Court has long recognized the impor-

tance of permitting access to agency documents such as the Office of Security's evaluation of Doe's case.

In *Gonzalez* v. *United States*, 348 U.S. 407 (1955), the Court held that where an applicant for conscientious objector status was entitled to a hearing on his application, he was also entitled to review and respond to the Department of Justice's recommendation to the Selective Service Appeal Board. The Court reasoned that "if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as the overall position of the Department of Justice." *Id.* at 413. Accordingly, the Court held that "the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." *Id.* at 415. As the Court pointed out in a companion case to *Gonzalez*, an opportunity to appeal an administrative decision cannot be "conducted on the level of a game of blindman's buff" and still satisfy "basic fairness." *Simmons* v. *United States*, 348 U.S. 397, 405 (1955).

These principles in turn were drawn from one of the Court's seminal cases on administrative law. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). Without this opportunity, "the right may be but a barren one." *Id.* Doe's opportunities for review were rendered barren twice: first when pursuing the Agency's offer to appeal to the Director, he was denied access to the Office of Security's "adjudication;" and again when the court of appeals held that that Doe had a right to judicial review under the APA, but no right to know the reasons for the Director's decision.

c. The CIA's own regulations provide that "normally" an employee will be informed of the reasons why he is recommended for termination. (App. 19a, 71a-72a.) Although the regulations also permit the Agency to discharge employees immediately without regard to these procedures when the circumstances of the case make them "impractical or undesirable" (*id.*), the CIA did not invoke this exception. Indeed, the district court found that exigent circumstances were not present in this case. (App. 71a.)

2. The court of appeals' extraordinary inversion of proper procedures was based on its concern that requiring a statement of reasons would endanger the national security. (App. 23a-24a, 26a, 32a.) There may be some instances where this is true. However, the danger is not so inevitable nor a remedy so unworkable that the courts are justified in withdrawing the right to a statement of reasons as a matter of course.

As noted above, the CIA's own regulations provide that "normally" its employees will be accorded the procedures Doe seeks. (App. 19a.) These regulations reflect the CIA's judgment that in the bulk of separation cases, the employee can be told the reasons for the Agency's proposed action. In cases where this is not possible, the agency can simply assert that national security considerations prevent it from disclosing the reasons for the proposed termination. This assertion need not be so detailed that it gives away the secrets that must be protected. Indeed, in cases involving the state secrets privilege and the national security exemption to the Freedom of Information Act, the lower courts have recognized that there are situations where government agencies cannot appropriately be required to explain their actions. *E.g.*, *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982); *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

In such cases, however, the courts require some minimal statement from a responsible agency official before departing from ordinary procedures. In this case, the CIA never asserted that it would endanger the national security to provide Doe with the Office of Security's evaluation of the alleged risks posed by his homosexuality. Nor did the CIA assert that it would endanger national security even to say that providing Doe with the evaluation would in turn endanger security. In the absence of any such claim or showing, there was no justification for holding that Doe was not entitled to the Agency's reasons.

## CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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